United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1243

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To be argued by
ROBERT J. JOSSEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1243

UNITED STATES OF AMERICA,
Appellee,

—v.—

GREGORY CHU, T N DONALD GEE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
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Preliminary Statement

Gregory Chu, true-name Donald Gee, appeals from a judgment of conviction entered on June 27, 1975, after a jury trial before the Honorable Milton Pollack, United States District Judge.

Indictment 73 Cr. 93, filed on January 28, 1973, charged defendants Gregory Chu and Barry Cohen with distribution and possession with the intent to distribute approximately 26.80 grams of heroin, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A). The one-count indictment also charged the defendants with a violation of Title 18, United States Code, Section 2.

Trial on Indictment 73 Cr. 93—as to defendant Chu* —commenced on May 29, 1975, and continued until May 30, 1975, when the jury found Chu guilty as charged. On June 27, 1975, Judge Pollack sentenced Chu to a term of imprisonment of ten years. Chu was remanded at sentencing.

On this appeal, defendant claims only that (i) the trial judge improperly admitted evidence of a prior illegal act offered to show intent; and (ii) the trial judge improperly allowed cross examination of the defendant's sole witness to exceed the scope of direct examination.

Statement of Facts

I. The Government's Case.

In August, 1972, Gregory Chu spoke with Barry Cohen about the repayment of a $500 loan which Chu had made to Cohen in March of that year (Tr. 92-94).** Chu, then known to Cohen also as "Ricky" and "Don", told Cohen that the latter could repay the loan in full by "turn[ing] a drug deal for [Chu] and out of [Cohen's] share of the profits which [he] wouldn't see . . . pay back the $500 that [he] borrowed" (Tr. 94).

Thereafter, Cohen discussed a drug transaction with Mike Colombo, who, unbeknown to Cohen, was an informant. Colombo asked Cohen if he knew anyone who could get him some heroin. Cohen told Colombo he would get back to him (Tr. 94-95). Subsequently, Cohen contacted Chu, who told him that he would supply the heroin.

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* Defendant Cohen pled guilty to the indictment on March 9, 1973 before Judge Bauman, and was sentenced on April 23, 1973.

** "Tr." represents references to the trial transcript, and "GX" refers to government exhibit.

On August 28, 1972, Chu contacted Cohen and told him he had the heroin and that Cohen should proceed to make arrangements for the sale. Chu informed Cohen he had about an ounce of heroin to be sold for approximately $1,700 (Tr. 98).

Cohen then contacted Colombo. They made arrangements for the sale to take place on August 30, 1972 (Tr. 98). Cohen relayed these details to Chu. On August 30th Chu called Cohen and they agreed that Chu would pick up Cohen at 7:50 p.m. that night.

At the agreed upon time on the evening of August 30th, Chu drove to Cohen's apartment in a green Peugot. As soon as Cohen entered the car, Chu asked if everything "was cool". Cohen responded affirmatively, and Chu displayed the heroin, as well as a revolver which he had with him for "security reasons" (Tr. 99-100).

Chu and Cohen then drove to the pre-arranged meeting place: a parthenon at an overlook on the Henry Hudson Highway near 189th Street (Tr. 17, 100). Cohen got out of the car, leaving Chu seated in the car behind the wheel with the heroin still in his possession and walked over to meet Colombo and the prospective buyer. The buyer was Alfred Visciarelli, an undercover police officer.

After Cohen was satisfied that Visciarelli had the requisite funds to make his purchase, he returned to the Peugot and obtained the heroin from Chu. Chu again inquired whether "everything was cool", and then handed the heroin to Cohen (Tr. 102). Cohen returned to Visciarelli and Colombo and the sale was thereupon consummated.

The meeting on the Henry Hudson Highway during which the drug transaction occurred was also observed by Stephen Berk, a New York City Policeman and member of the Joint Task Force (Tr. 43), and Gerard Miller,

a group supervisor for the Drug Enforcement Administration ("DEA") (Tr. 70-75). Berk was able to identify Chu as the driver of the green Peugot (Tr. 43), while Miller, who viewed the scene from a different perspective, could only describe the driver as an Oriental male (Tr. 73, 75). Visciarelli—the undercover buyer—was able to testify that the driver of the Peugot was an Oriental male, and that he observed the driver hand a package to Cohen (Tr. 21, 23).*

Upon completion of the August 30th sale and the exchange of the $1,700 for the heroin (Tr. 23-24), Berk, Visciarelli and Colombo field-tested the substance which had been sold to them by Cohen. A positive reaction for heroin was obtained (Tr. 48-48).**

II. The Defense Case

The sole witness called by the defense was Michael Colombo. Colombo's direct testimony was elicited in an effort to impeach the testimony of Barry Cohen, the co-defendant. Colombo testified that—contrary to Cohen's assertions (Tr. 94, 105)—Cohen had sold cocaine and heroin to Colombo on "50, 100" different occasions, and

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* The day before the sale, Berk had conferred with Colombo who told him that Cohen had heroin to sell. Colombo also told Berk that Cohen's source was a Chinese man, known to him as "Ricky", and that "Ricky" wanted to be present at the transaction (Tr. 70).

On the way to the parkway rendezvous, Colombo told Visciarelli that Cohen and his friend "Ricky" could do "weight in heroin"—which meant that they could sell an ounce or more in heroin (Tr. 37-38).

** The parties stipulated that Roger Godino, a DEA chemist, would testify, if called as a witness, that GX 1 was a substance which weighed 26.80 grams, and which contained heroin in the amount of 7.2 percent (Tr. 51-53).

The parties further stipulated that a man named Larry Sky—to whom the green Peugot was registered (Tr. 44)—rented the car to Chu in August of 1972 (Tr. 87).

on the question of whether Cohen had fabricated his story that Chu was an active participant on the night in question.

The law in this circuit plainly permits introduction of relevant evidence relating to prior unlawful acts, except where the purpose of such evidence is to show bad character or criminal disposition. Thus, this Court recently observed that

> "we are by now firmly wedded to the inclusory form of the rule, that evidence of other crimes is admissible, if relevant, except when offered solely to prove criminal character." *United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir. 1975).

See also United States v. *Torres*, Dkt. No. 74-2303 (2d Cir., July 2, 1975) slip op. 4573, 4580; *United States* v. *Campanile*, 516 F.2d 288, 292 (2d Cir. 1975); *United States* v. *Gerry*, 515 F.2d 130, 140-141 (2d Cir. 1975); *United States* v. *Johnson*, 382 F.2d 280, 281 (2d Cir. 1967) (per curiam); *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967). Whether such evidence should be admitted is a question which calls for the exercise of the trial court's broad discretion, informed upon a weighing of the probative value of the evidence against its potentially prejudicial effect. *United States* v. *Brettholz*, 485 F.2d 483, 487-88 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974). *Cf.*, *United States* v. *Ravich*, 421 F.2d 1196, 1204-05 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970).

While defendant claims to recognize these principles in the abstract, he argues that there was no disputed issue to which the evidence of Chu's prior act could be addressed and hence, that the introduction of such evidence could have been for no other purpose than to show defendant's criminal disposition. This argument is founded upon a

that Cohen had initiated the August 1972, sale charged in the indictment (Tr. 134).

On cross-examination of Colombo it was established that on one of the 50 to 100 occasions when Cohen had sold heroin to Colombo, Chu had supplied the heroin. At the time of the earlier sale, Cohen introduced Chu to Colombo in Cohen's apartment. This sale occurred only two months prior to the August 30th heroin deal of which Chu was convicted in the Court below (Tr. 145-149).

ARGUMENT

POINT I

The trial court properly admitted evidence of a prior similar act as bearing upon defendant's motive, knowledge and intent.

Defendant's principal contention on this appeal is that the District Court committed error in allowing evidence of a prior similar act to be elicited on cross examination of the sole defense witness, after the defendant opened the door to such matters on direct examination. In the circumstances of this case—where the Government's proof showed that defendant was in a car at the location of the drug transaction but not involved in the actual purchase discussions with the buyer—the District Court's admission of evidence of a prior act, together with its limiting instruction (Tr. 197-198), were clearly proper. The evidence that Chu, on a prior occasion no more than two months before the sale charged in the indictment, had supplied heroin to co-defendant Cohen in a transaction with informant Colombo, was highly probative with respect to the issue of whether Chu possessed heroin with the *intent* to distribute it on August 30, 1972, as well as

narrow view of the thrust of the defense here, and overlooks the well-settled rule that evidence of a similar act is admissible where knowledge, intent or design is at issue, "either by the nature of the facts sought to be proved by the prosecution or the nature of the facts sought to be established by the defense." *United States* v. *De Cicco*, 435 F.2d 478, 483 (2d Cir. 1970).*

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* Defendant's considerable reliance upon *De Cicco* (Appellant's Brief at 16-17) to support his claim of error, is misplaced. The evidence of prior acts in *De Cicco* was not limited by the trial court to the actual "doers" of those acts, and the jury was therefore improperly permitted to consider the prior misconduct to infer guilty intent on the part of the other two defendants who had not been involved in the prior acts. 435 F.2d at 483. It is true that the Court also couched its decision in terms of the prejudice to the "doers" themselves. But, unlike here, there was no possible defense argument with respect to knowledge or intent. In the instant case, defense counsel recognized that even if Cohen was not believed by the jury, Chu had been placed at the scene of the deal by Berk. Accordingly, defense counsel urged that Chu's "mere presence" was not a crime. Given the fact that the defendant was likely to—and in fact did—place his purpose and actions in issue, the prosecution was entitled to show that Chu's presence on August 30th was purposeful, and that he possessed the heroin with the intent to distribute it. Finally, *De Cicco* does not affect the still recognized rule that admission of prior acts is within the discretion of "the trial judge who has a feel for the effect of the introduction of this type of evidence that an appellate court, working from a written record, simply cannot obtain." *United States* v. *Leonard*, Dkt. No. 75-1153 (2d Cir., Aug. 28, 1975), slip op. 5843, 5867. The circumstances here—where the prior act was a single episode virtually identical to and contemporaneous with the transaction charged—stand in marked contrast to the prior acts in *De Cicco*—which involved cumulative testimony suggesting that the defendants were part of "a continuing band of art treasure thieves and 'fencers.'" 435 F.2d at 484. Thus, even if *De Cicco* were applicable, it would not support a finding that the District Court abused its discretion in permitting evidence of the prior sale.

Here, the defense theory could be reasonably viewed as either: (i) the prosecution failed to establish, beyond a reasonable doubt, that Chu was present at the heroin transaction on August 30, 1972; or, (ii) Chu was present, but was merely an innocent bystander—Cohen was the only active participant in the sale. Each of these theories rested upon an attack of Cohen's credibility, and establishing his motive to lie, or bias. Each theory, however, as it touched upon Chu's role that night, equally placed in issue whether Chu possessed the heroin with the *intent* to distribute it on August 30, 1972.

In both his opening (Tr. 12-13) and summation (Tr. 169-171) defense counsel argued that Cohen was trying to shift the blame to Chu, and to fabricate the claim that Chu was Cohen's source for the August 30th deal. He argued further in summation that even if Chu had been present, disbelief of Cohen would raise a reasonable doubt whether Chu had done anything more than lend his presence to the illegal sale (Tr. 175-178).

In the face of defense counsel's arguments, it bears emphasis that Chu was not merely charged with aiding and abetting, but was charged with actual possession of the heroin with the intent to distribute it. Since intent to distribute was an essential element of the crime charged, the Government was entitled to meet head-on the purpose of Chu's presence at the site of the sale and whether he intended to distribute heroin that evening. *Cf. United States* v. *Gerry, supra; United States* v. *Brettholz, supra; United States* v. *Klein*, 340 F.2d 547 (2d Cir.), *cert. denied*, 382 U.S. 850 (1965). Evidence that Chu—only two months before—had supplied heroin to Cohen, was highly relevant to show that Chu was not a mere innocent bystander on August 30th, but that he had been, consistent with Cohen's testimony, the source of the heroin involved in this case.

The District Court's rulings manifest a clear understanding of the permissible purpose of evidence of the prior act. When objection was raised at trial to evidence concerning the prior act, Judge Pollack stated the basis for permitting such testimony:

> "THE COURT: The objection is overruled. The inquiry may be considered pertinent to motive and intent in the transaction under indictment." (Tr. 146).

Thereafter, following the Court's charge to the jury (which included the appropriate limiting instruction), Judge Pollack again explained at length the reasons for admitting evidence of the prior act:

> "(At side bar.)
>
> THE COURT: Are there any exceptions or requests on the part of the defense?
>
> MR. GILLERS: No exceptions.
>
> The only request is as to the prior similar act.
>
> THE COURT: I thought I would put my response to that in the record.
>
> The defendant called the witness Colombo to establish that Cohen, in contract [sic] to his testimony on cross examination that the transaction charged in this case was an isolated one, in fact had prolix transactions with Colombo in narcotics. This was allowed not as an attack merely on Cohen's credibility but as going to Cohen's bias and motive. However, it appeared on cross examination that one of the prolix transactions brought out on Colombo's direct examination by defendant was in fact a narcotic transaction in which Chu, Cohen and Colombo participated. The proof that

identified one of the prolix transactions as one with Chu was allowed as going to Chu's motive and intent in respect to the transaction charged in the indictment. The door was opened by the defendant to this explanation by calling forth on direct examination of the witness that Cohen had prolix transactions with Colombo. The evidence bore on the determination whether defendant acted with guilty knowledge and intent in respect to the transaction charged in the indictment.

A limiting instruction requested by the government limited the significance of the evidence only to the question of the guilty knowledge and intent of defendant and not to show bad character or criminal disposition.

Accordingly, I allowed the evidence and so charged the jury, with exception to the defendant" (Tr. 201-202).

Similar to the situation raised here is this Court's decision in *United States* v. *Brettholz*, *supra*. In *Brettholz*, the trial court admitted evidence on the Government's direct case that the witness had purchased cocaine from one defendant on an occasion within a year prior to the transaction in question. Evidence of the prior acts was admitted to show intent to distribute. Following this testimony, the defendant took the witness stand and testified that, on the night in question in the indictment, he had been present at the scene of the cocaine transaction, but had been there to purchase marijuana, not to sell cocaine.

Applying the Second Circuit's inclusionary test, the Court of Appeals affirmed the convictions and found no error in the admission of evidence relating to the prior

acts. The Court found such evidence clearly relevant to prove intent and motive.*

To the same effect is *United States* v. *Klein*, 340 F.2d 547 (2d Cir.), *cert. denied*, 382 U.S. 850 (1965). There the court affirmed a conviction in an interstate transportation of forged securities case, where evidence was received that the defendant had given stolen checks to a witness two years before the events involved in the indictment. The defendant in *Klein* was charged solely with aiding and abetting by virtue of his presence and assistance on occasions when the co-defendant attempted to cash stolen checks. The defendant did not testify. In upholding the relevance of the evidence of prior acts, the Court stated:

> "As applied to the facts of this case the principle is clear and compelling. Many innocent persons might accompany their friends to one, two or even seven banks without realizing that their companion was in the process of attempting to negotiate forged cheques. And they might likewise engage in an exchange of money. However, it would be wholly unrealistic to assume that a person such as Klein, who had previously engaged in the business of cashing forged cheques, would not have surmised from Bluver's activities that a forgery was being perpetrated in at least some of the seven banks they visited or that he had no interest in the venture. The evidence being so highly relevant to the issues of knowledge and intent, it was there-

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* Although the defendant in *Brettholz* testified, unlike the defendant here, the trial court admitted evidence of the prior act *before* the defendant took the stand. The Court of Appeals indicated that receipt of such evidence did not rest upon the defendant first raising the issue of motive or intent. This view is consistent with the theory that prior acts are relevant where the facts, even as contended by the Government, place intent in issue. *Cf. United States* v. *Leonard, supra*, slip op. at 5865-5868.

> fore admissible notwithstanding the possibility that the jury might have used the evidence in a prejudicial manner contrary to Judge Tyler's careful instructions." 340 F.2d at 549.

Like the defendant in *Klein*, Chu would have had the jury believe that he was merely present at the heroin sale on August 30, 1972 and that, even if he knew what was going on, he did not participate in the transaction in any manner. That his defense rested upon an attempt to destroy the credibility of Cohen and an effort to establish the difficulty for Visciarelli to observe his movements (Tr. 171-72), in no way lessened the prosecution's burden of proving the essential element of Chu's intent to distribute.* Indeed, Chu's defense squarely placed in issue his purpose, motive and intent on August 30, 1972. Evidence of the prior similar act—which occurred only two months before and involved Cohen, Colombo, Chu and heroin—was thus clearly relevant to the jury's consideration of intent and knowledge. Even though such evidence "improve[d] [the Government's] position" at trial, *cf. United States* v. *Freedman*, 445 F.2d 1220, 1223 (2d Cir. 1971), by rehabilitating Cohen's earlier testimony, its principal relevance was to prove Chu's intent, knowledge and motive.

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* Defendant's assertion (Appellant's Brief at 13, 18) that the sole defense was Chu's "mere presence" at the heroin sale, and that motive and intent are "irrelevant" to this defense, misapplies the "mere presence" doctrine to the case at bar. Both *United States* v. *Terrell*, 474 F.2d 872 (2d Cir. 1973) and *United States* v. *Garguilo*, 310 F.2d 249 (2d Cir. 1962), relied upon by defendant, involved *only* charges of aiding and abetting. Here, the Government proceeded principally on the theory that Chu possessed the heroin with *intent* to distribute. Moreover, even under defendant's "mere presence" theory, Chu did not concede that he knew heroin was the subject of the August 30th meeting. Thus, the Government was entitled to prove, at a minimum, that based upon his prior similar act under similar circumstances, Chu had knowledge of the purpose of Cohen's meeting on the Henry Hudson Parkway.

Accordingly the District Court's receipt of such evidence—elicited only after the defendant had opened the door during the direct examination of his own witness—was entirely proper.

POINT II

The cross examination of Colombo was proper.

Defendant's second contention on appeal—largely cut from the cloth of his first argument—is that the trial court erroneously permitted the Government's cross examination of Colombo to exceed the scope of direct. The scope of cross examination allowed by Judge Pollack, however, was clearly within the subject matter first raised on direct, and was a proper exercise of the District Court's discretion.

On direct examination Colombo was asked whether Cohen had ever previously sold cocaine or heroin to him. To these questions, Colombo responded that he had purchased cocaine and heroin "50, 100" times from Cohen (Tr. 134). Colombo was also asked who instigated the August 1972 deal charged in the indictment, to which he responded, "Barry [Cohen]" (Tr. 134).

The record here demonstrates that the Government's cross examination of Colombo was limited to the two subjects first elicited in direct testimony; namely, the 50-100 transactions between Cohen and Colombo, and the circumstances surrounding the August 1972 sale involved in the instant case. Colombo's cross revealed that one of the 50-100 transactions between Cohen and the witness involved the sale of heroin supplied by Chu. Furthermore, while Colombo's direct testimony contradicted and impeached Cohen's assertions as to who instigated the August transaction (see Tr. 94-95, 134), the balance of Colombo's cross elicited prior consistent statements and

served to rehabilitate Cohen's testimony as to the essential facts surrounding the transaction. *Compare*, Tr. 92-93, 102-103 *with* Tr. 136-137, 143-144.

Defendant's recitation of the rule that cross examination is limited to the subject matter of the examination in chief (Appellant's Brief at 19-20) omits the equally basic part of the formula that the scope of cross examination is a matter within the sound and broad discretion of the trial court. *See, e.g., United States* v. *De Marco*, 488 F.2d 828, 831 n. 8 (2d Cir. 1973); *United States* v. *Lewis*, 447 F.2d 134, 139 (2d Cir. 1971); *United States* v. *Evanchik*, 413 F.2d 950, 953 (2d Cir. 1969); *United States* v. *Dardi*, 330 F.2d 316, 333 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964). In the case at bar, Judge Pollack properly exercised his discretion in permitting inquiry on cross into areas first opened on direct examination (Tr. 201).

Defendant appears to presume that cross examination is limited to the specific questions asked of the witness on direct. The well-recognized rule remains, however, that cross examination is not so confined, but is governed by the areas or subject matter of the direct examination. *See, e.g., Maxfield* v. *United States*, 360 F.2d 97, 102 (10th Cir.), *cert. denied*, 385 U.S. 830 (1966). *Cf. Union Automobile Indem. Ass'n* v. *Capitol Indem. Ins. Co.*, 310 F.2d 318, 321 (7th Cir. 1962). The Tenth Circuit succinctly stated the rule governing the scope of cross as follows:

> "The trial court has broad discretion in setting the limits of cross-examination. It may embrace any matter germane to the direct examination, qualifying or destroying it, or tending to elucidate, modify, explain, contradict or rebut testimony given in chief by the witness." *Leeper* v. *United States*, 446 F.2d 281, 288 (10th Cir. 1971), *cert. denied*, 404 U.S. 1021 (1972).

Once the subject of prior transactions between Cohen and Colombo was opened on direct, the Government "was not bound to let the defendant bring out only what he pleased and be content itself with no more." *Vause* v. *United States*, 53 F.2d 346, 352 (2d Cir.), *cert. denied*, 284 U.S. 661 (1931), quoted with approval in *United States* v. *Miller*, 381 F.2d 529, 538 (2d Cir. 1967), *cert. denied*, 392 U.S. 929 (1968). Simply put, Colombo's testimony about Chu's prior heroin act was directly encompassed in the "50, 100" transactions first referred to on direct examination. *Cf. United States* v. *Roselli*, 432 F.2d 879, 904 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971); *United States* v. *Kelley*, 314 F.2d 461 (6th Cir. 1963).

Similarly, once defense counsel elicited evidence about the transaction in issue under the indictment, it was not an abuse of discretion for the Court to permit subsequent inquiry into the particulars of the sale. *Cf. Harrison* v. *United States*, 387 F.2d 614 (5th Cir. 1968).*

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* In *Harrison*, the Fifth Circuit affirmed a conviction for transferring heroin not in, or from the original stamped package and otherwise than pursuant to a requisite order. Appellant there claimed error in testimony, brought out on redirect, that defendant had engaged in prior narcotics transactions with the witness. There, like here, the door to such matter had been opened by defense counsel who first elicited that there was a prior indebtedness between the witness and the defendant. This indebtedness, it turned out, stemmed from prior drug transactions. The Court found no error in such redirect and stated:

> "Where a witness has been cross-examined as to a part of a transaction then the whole thereof, to the extent that it relates to the same subject matter, may be elicited on redirect examination. *Kowalchuk* v. *United States*, 6 Cir., 176 F.2d 873; *Zacher* v. *United States*, 8 Cir., 227 F.2d 219; *United States* v. *Brecher*, 2 Cir., 242 F.2d 642; *United States* v. *Davis*, 7 Cir., 262 F.2d 871." 387 F.2d at 615.

In the final analysis, even assuming *arguendo* that the trial court erred by allowing this cross of Colombo, such error was, at most, harmless. The Government was entitled to prove the prior similar act in its case in chief or rebuttal (see Point I, *supra*). That such evidence was established on cross examination of a defense witness should not affect its admissibility. *Cf. United States* v. *Moseley*, 450 F.2d 506, 510 (5th Cir. 1971), *cert. denied sub nom. Bettker* v. *United States*, 405 U.S. 975 (1972). Once Cohen had been impeached, the Government was entitled to rehabilitate his testimony by proof of prior consistent statements. *Cf. United States* v. *DiLorenzo*, 429 F.2d 216, 220 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971).

In the face of the clear admissibility of the evidence elicited on Colombo's cross, the only possible prejudice suffered by defendant * was the use of leading questions on cross. While admittedly the prosecutor engaged in some leading questions, on the vital area of Chu's prior act the witness told his own story without leading (Tr. 145-150). Thus, in the circumstances of this case, where there was overwhelming evidence to support the jury's verdict, if there was an error in the scope of cross examination allowed by the trial court, such error was harmless and should not occasion reversal of the conviction by this Court.

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* Defendant cannot contend that he was prejudiced by the mere fact that this evidence came out on cross examination of his witness. As the defense strategy developed at trial, plainly the defendant's case was enhanced by the opportunity to argue to the jury that the discrepancies in Cohen's testimony were elicited in the defendant's case. See Tr. 167-170.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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ROBERT J. JOSSEN,
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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Robert J. Jossen being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 6th day of October, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Stephen Gillers, Esq.
Warner & Gillers, P.C.
506 Fifth Avenue
New York, New York 10036

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Robert J. Jossen

Sworn to before me this
6th day of October, 1975

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977